LAW NOTES

LEGAL RELATIONSHIP BETWEEN THE STUDENT AND THE PRIVATE COLLEGE OR UNIVERSITY

INTRODUCTION

As American higher education moves from the turbulent sixties into what may be cautiously predicted as the even more tumultuous seventies, it carries with it the scars of the "student rights" battle. "The 'silent' college generation of the 1950's has given way to a generation of student activists who have made headlines throughout the world in recent years. Campus unrest has become a major political and social factor."[1]

Such unrest has also become a major legal problem. A recent article by Professor William W. Van Alstyne, a foremost authority in this developing field, has proposed that the new law school courses in race relations, rights of privacy, the law of poverty, church-state relations, and reapportionment should perhaps be joined in some of our law schools by a seminar on student rights. The activism of the past decade has placed unbearable strains on the traditional legal theories used to settle occasional litigation between colleges and their more militant students.[2] Such theories are no longer relevant.[3] Several principal factors have contributed to influence this transition in legal approach to student rights: (1) the changing character of higher education; (2) the changing character of academic freedom (due largely to the efforts of the American Association of University Professors); (3) the changing character of constitutional liberties; and (4) the demise of the *in loco parentis* doctrine.[4] What has really happened, in effect, is that the relationship of higher education itself to the society in which it exists has shifted dramatically. The fact is increasingly recognized that collegiate

1. Mooney, *Unrest on Campus*, in STUDENT PROTEST AND THE LAW 53 (G. HOLMES ed. 1969).

2. Van Alstyne, *A Suggested Seminar in Student Rights*, 21 J. LEGAL ED. 547 (1969).

3. Van Alstyne, *Student Academic Freedom and the Rule-Making Powers of Public Universities: Some Constitutional Considerations*, 2 L. IN TRANS. Q. 1 (1965).

4. *Id.* at 6-18.

and even graduate education is essential for a growing number of persons to earn their livelihood in modern society, as well as to improve the quality of life. Enrollments are burgeoning, bringing internal stresses at the same time as society looks to higher education for increasing service to society itself. Movements such as "civil rights" immediately find battlegrounds on college campuses, where questions of constitutional rights are being fought out. In the light of these changes, it is evident that a rational theory of the legal relationship between the student and the university can only develop within the context of the university as an instrument of society.[5] In this concept, student-university relationships cease to be the private affairs the university has long considered them. The university's responsibility to its students is a responsibility to society.

As courts and theoreticians probe—perhaps it would be more accurate to say "grope for"—the basis of the student-university affiliation in all its complexity, certain clear distinctions emerge from the discussions: (1) legal differentiation of the academic and non-academic reasons why students might incur sanctions; and (2) the distinction between the judiciary's treatment of state-supported and non-state-supported institutions, in other words, the public sector and the private sector of education.

Three aspects of the above distinctions have become major problem areas in the law on student rights, namely, the non-curricular side of student-university relations, the status of the private university, and the position of the public sector of higher education. As to academic questions, the judiciary's traditional "hands-off" policy still prevails. Courts have simply (and quite properly) refused to review substantive scholastic decisions; the determination of delinquency in studies or components of curriculum remains within sound administrative discretion.[6] In fact, a statute necessitating a hearing in disciplinary dismissals was held not to apply to academic disqualification.[7] This seems to be the well established judicial trend, in spite of some suggestions to the contrary.[8] It may seem odd that faculty

5. McKay, *The Student as Private Citizen*, 45 DENVER L.J. 558, 560 (1968).

6. Note, *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1152 (1968).

7. Barnard v. Inhabitants of Shelburne, 216 Mass. 19, 102 N.E. 1095 (1913).

8. Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1069 (1969). *Cf.* Note, *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. at 1139,

members are left undisturbed in their grading procedures, while actions of presidents and deans of students in dismissing students are subject to judicial review.[9] However, the difference in treatment appears valid when one considers the insuperable difficulties which would ensue from court grading of papers!

> [C]ourts are expert in applying the first amendment and the due process clause, but the persons on campus are the experts in deciding the academic value of a particular piece of work. . . . I perceive no basis on which a student can claim a constitutional right to a *D* rather than an *F*, so long as the grade given him was the good faith academic judgment of his instructor.[10]

Everyone knows, in theory, and those of us with long years of experience in college or university teaching are aware, in practice, that students do indeed question the "good faith judgment" of their instructors. Nonetheless, the "hands-off" policy of the judiciary in this respect is exceedingly sound; courts might very well find themselves out of their depth if they undertook the construction of curricula or the analysis of grade distribution summaries. Such matters are best left to the accrediting agencies.

The other problem areas which have arisen from discussions of student-university relationships are closer to court competence. The non-curricular side of the student-university affiliation, the status of the private university, and the position of the public sector of higher education all involve constitutional issues, as well as non-constitutional theories. The first of these three problem areas—non-academic reasons for sanctions against students—has often been subsumed into the other two. Judicial handling of the nature and validity of the sanctions has depended on whether the university is public or private. In the emerging problem of residential privacy, though it is still a blurred and undeveloped area of the law, the public-private distinction has been less cogent, as will be shown. For the most part, however, the public-private distinction has been recognized in most of the treatises on emerging legal principles and procedures applicable to student

suggesting that even the grade given to a student should perhaps be subject to judicial review if it leads to his expulsion. For an analysis of an interesting case involving conflicting testimony of professors attempting to introduce evidence on their divergent grading of plaintiff student's papers, see Note, *Judicial Intervention in Expulsions or Suspensions by Private Universities*, 5 WILLAMETTE L.J. 277, 278 (1969).

9. Wright, *supra*, note 8 at 1070.

10. *Id.*

rights, and numerous cases have discussed and/or used the distinction as the basis for their holdings. The legal relationship between the student and the private college or university may be analyzed through a discussion of the following areas: (1) Historical background—constitutional protection of private education along with absence of student rights in *all* higher education; (2) Development of constitutional protection of student rights—its applicability to private institutions and to the developing area of residential privacy; and (3) Applicability of non-constitutional theories—their validity in defining the student-university relationship and in protecting student rights.

HISTORICAL BACKGROUND

American higher education began as a private, usually church-related enterprise. By charter, private institutions can be classified thus: institutions chartered by the Crown, for example, Columbia; institutions chartered by one of the early English colonies in the New World, that is, Harvard; institutions chartered by Act of Congress, such as George Washington University; and the large number of institutions chartered by the state.[11] Commonwealth or state colleges and universities were a subsequent development.[12] In the first quarter of this century, severe challenges to the concept of private education were discouraged by decisions of the United States Supreme Court in *Pierce v. Society of Sisters*[13] and *Meyer v. Nebraska*.[14] Interestingly enough, both holdings were on fourteenth amendment grounds and thus shed light on cases in the 1960's in which certain clauses of the fourteenth amendment were held not applicable to private institutions. In *Meyer*, the main issue was the constitutionality of a Nebraska statute prohibiting instruction in or teaching of a foreign language in public, private, denominational and parochial schools, to children below the eighth grade, and hence, barring teaching of reading in the German language to a ten-year-old by plaintiff instructor in a

11. Note, *Judicial Intervention in Expulsions or Suspensions by Private Universities*, 5 WILLAMETTE L.J. at 277 n.6 (1969).

12. *Cf.* H. GOOD & J. TELLER, A HISTORY OF WESTERN EDUCATION 473-75 (3d ed. 1960).

13. 268 U.S. 510 (1925).

14. 262 U.S. 390 (1923).

Lutheran parochial school.[15] The issue was whether the statute, as construed, infringed upon liberties guaranteed to plaintiff by the fourteenth amendment.[16] The Court held that the statute as applied was "arbitrary and without reasonable relation to any end within the competency of the State."[17]

The *Pierce* case was also decided upon grounds of an unreasonable deprivation of liberty, violative of the fourteenth amendment. At issue was the Oregon Compulsory Education Act of 1922, requiring that all children be educated in public institutions. Reiterating the State's lack of competence to infringe rights guaranteed by the Constitution, the Court held that the Act "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."[18] It is evident from *Pierce* that private schools and colleges enjoy immunity under the fourteenth amendment from unreasonable interference with their liberty to serve students of all ages in accord with the desires of parents.[19] The logical subsequent question is whether institutions which have been warranted against deprivations of their rights to life, liberty, and property must, under the fourteenth amendment, grant these rights to the students over whom they exercise certain controls. The question applies, of course, to both the public and the private sectors of education.

The historical answer to the question was "No" for both public and private institutions. Courts were reluctant to interfere, even in non-academic areas, with the discretionary authority of university officials. Part of their reason for this may have been well-founded deference to the expertise of educators, and an understandable fear that their interference on behalf of students might threaten the well-being of educational institutions.[20] Perhaps a more cogent reason was the fact that the statutes and charters establishing both public and private institutions of higher education concerned themselves with trustees and corporate relationships and not with student-university relationships.[21] At

15. *Id.* at 393, 397.
16. *Id.* at 399.
17. *Id.* at 403.
18. 268 U.S. at 534-35.
19. *Id.* at 535.
20. Beaney, *Students, Higher Education, and the Law*, 45 DENVER L.J. 511, 514 (1968).
21. *Id.* at 513.

any rate, American institutions assumed from the start that, whatever might be the traditions and practices of medieval European universities or other "ancestors" of higher learning, their governing boards and administrative officers had unlimited control over curriculum and virtually unlimited (or at least, rarely challenged) power to control student conduct and activities.[22] It should be noted—although this aspect seems to have been overlooked in most discussions of the subject—that American higher education's roots in private, usually church-related schools is significant in this regard. Many schools began as seminaries to train ministers for the various denominations. The majority of their students were those who could afford to pay. It was natural, therefore, that there was an historically-accepted emphasis on discipline, and on the obligation of the "seminaries" (as Harvard and others were called) to require conduct becoming a Christian and a gentlemen. Legally, the courts gave substance to this concept in the doctrine of *in loco parentis*, the idea that the school or university stands in the place of parents, and thus is responsible for the moral training of the student as well as his intellectual progress. Such training was generally accomplished by exacting strict conformity to regulations which would ensure good order on the campus and an upright moral life for the student. It was this concept of student-university relationships which led Editor Kramer of the Harvard *Crimson* to write: "The typical university is only slightly more democratic than the army, if less unpleasant."[23]

Reinforcing the doctrine of *in loco parentis* was the universally accepted notion that university attendance was a "privilege," and not a "right." In a country which early espoused the idea of the right of all citizens to elementary, and later secondary education, only a small minority of the population could aspire to the institutions of higher learning. Gradually, as state teachers' colleges (which helped make compulsory education at the lower levels possible) evolved into full-fledged colleges, and state universities mushroomed, access to higher education became common—and even necessary for many jobs or professions. However, the right-privilege dichotomy still prevailed. As recently

22. *Id.*

23. N.Y. Times, May 26, 1968 (Magazine), as quoted in Wilson, *Protest Politics and Campus Reform*, 21 AD. L. REV. 45, 50 (1968).

as the mid-1930's, the Supreme Court spoke of attendance at public universities as a privilege, not a right.[24] Clearly, then, judiciary policy would leave broad latitude to institutions in making disciplinary decisions—short of arbitrariness, which courts have always investigated[25]—because the institutions stood "in the place of parents" and because the students did not have a "right" to attend the institution anyway. As late as 1959, a student who requested review found that he had lost a "privilege" rather than vindicated a "right."[26] Only the last decade has witnessed any substantive shift in the law in this area.

DEVELOPMENT OF CONSTITUTIONAL PROTECTION OF STUDENT RIGHTS

When the Fifth Circuit handed down the decision in *Dixon v. Alabama State Board of Education*[27] in 1961, the importance of the "right-privilege" dichotomy as a legal theory was minimized. With the recognition in *Dixon* that "[w]henever a governmental body acts so as to injure an individual, the Constitution requires that the act be consonant with due process of law,"[28] student rights were protected from invasion by state-supported institutions, who could no longer invoke privilege of attendance as a means of denying due process to the student. Hence, it ceased to matter much whether the student was there by "right" or by "privilege"; he could not be severed from the institution without being heard in his own behalf.

Student rights under the fourteenth amendment are much more clearly discernible for public institutions than for private ones, although it took the courts many decades to articulate such rights even for the public sector. It is not difficult to see why. The law by its very nature values continuity, developing by slow steps as conditions of life change.[29] Until the university itself began to

24. Hamilton v. Regents of the University of California, 293 U.S. 245 (1934).

25. But while testing arbitrariness, courts have given administrators the benefit of a presumption of reasonableness, *cf.* Gott v. Berea College, 156 Ky. 376, 161 S.W. 204 (1913); Anthony v. Syracuse University, 224 App. Div. 487, 231 N.Y.S. 435 (1928); State *ex rel.* Sherman v. Hyman, 180 Tenn. 99, 171 S.W. 2d 822 (1942), *cert. denied* 319 U.S. 748 (1943).

26. Steier v. New York State Education Commissioner, 271 F.2d 13 (2d Cir. 1959).

27. 294 F.2d 150 (5th Cir. 1961), *cert. denied* 368 U.S. 930 (1961).

28. *Id.* at 155.

29. Wright, *supra*, note 8 at 1027-28.

reevaluate its essential mission and its relationship to society, the courts could hardly be expected to impose a new self-image upon higher education. When the change came it came dramatically, one of those exceptional movements of "sudden about-face" when the law turned 180 degrees.[30] Illustrative of the shift are two cases only a couple of years apart. In *Steier v. New York State Education Commissioner*[31] in 1959, one of the majority opinions decreed, in effect, that the plaintiff was free under the United States Constitution to say what he wished, but not free to say it as a Brooklyn College student.[32] In spite of a stirring dissent calling for more humane treatment of Steier, he lost his case and his status at Brooklyn College, which he had the "privilege" of attending.

But the voices of eloquent dissenters and theoreticians were not to be lost on the courts. The dissent in *Steier* was added to the lament of Professor Warren Seavey, in a now-famous and much-quoted article:

> It is shocking that the officials of a state educational institution, which can function properly only if our freedoms are preserved, should not understand the elementary principles of fair play. It is equally shocking to find that a court supports them in denying to a student the protection given to a pickpocket.[33]

Within two years after the Second Circuit refused relief to Steier, the Fifth Circuit heard *Dixon v. Alabama State Board of Education*. *Dixon* changed the pattern for state-supported institutions, standing as it does for the basic proposition that the courts will recognize and protect student rights to procedural due process, and will not allow the state to condition the right to an education upon the waiver of the constitutional right to procedural due process.[34]

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30. *Id.*

31. 271 F.2d 13 (2d Cir. 1959).

32. *Id.* at 20. Arthur Steier wrote two letters to the president of the college complaining about college dominance of student organizations. His comments would probably cause little stir on campus today, when presidents are accustomed to such criticisms. After being readmitted on probation a few months later, he gave the story of his probation to the college newspaper, and was consequently expelled.

33. Seavey, *Dismissal of Students: "Due Process,"* 70 HARV. L. REV. 1406, 1407 (1957).

34. The elements of procedural due process as applicable on college campuses have been thoroughly reviewed in many treatises, notes, and court opinions over the past decade.

However, the *Dixon* holding is restricted to the public university. Courts—barring extenuating circumstances[35]—have generally held it inapplicable to private colleges and universities. An analysis of their reasons for so holding, as well as an inquiry into comments in the law journals, may serve as a basis for forecasting possible future trends. The vast literature which has sprung up on student rights contains many isolated comments and several specific analyses of the applicability of constitutional principles to private institutions in the area of student rights.[36] Theoreticians generally separate the procedural issues from the substantive question of the right of private institutions to set legitimate goals and to establish reasonable rules to achieve such goals. On the procedural issue, most writers indicate that the trend is towards due process requirements for all institutions, public or private, but it has proven difficult to base this trend on

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They will not be repeated in detail here. Briefly, the elements are: notice of grounds of the proposed disciplinary action; the opportunity to appear before those responsible for the disciplinary action and make such showing or explanation as desired; adequate notice of the nature of the evidence, *cf.* Esteban v. Central Missouri State College, 277 F. Supp. 649, 651 (W.D. Mo. 1967), which adds: "The precise nature of the notice and hearing will of course vary depending upon the circumstances of the particular case." Most courts do not recognize an absolute right to counsel in such proceedings. However, colleges and universities which have set up disciplinary procedures generally give the student the option of counsel if he so desires.

For full discussions of the developing recognition of the right of students in state-supported institutions to procedural due process, see Van Alstyne, *Judicial Trend Toward Student Academic Freedom,* 20 U. FLA. L. REV. 290 (1968); Van Alstyne, *Procedural Due Process and State University Students,* 10 U.C.L.A. L. REV. 368 (1963); Note, 81 HARV. L. REV. 1045, 1134-1143 (1968); Note, *Reasonable Rules, Reasonably Enforced—Guidelines for University Disciplinary Proceedings,* 53 MINN. L. REV. 301 (1968); Note, *The Fourteenth Amendment and University Disciplinary Procedures,* 34 MISSOURI L. REV. 236 (1969); Note, *College Disciplinary Proceedings,* 18 VAND. L. REV. 819 (1965)—the article includes suggestions for legislation in this area, plus a "model statute."

35. *Cf.* Hammond v. University of Tampa, 344 F.2d 951 (5th Cir. 1965), where the court held that

> [a]lthough the University of Tampa is not a state or city institution in the usual sense, its establishment was largely made possible by the use of a surplus city building and the use of other city land leased for the University purposes. . . . [T]he City's involvement in the establishment and maintenance was of such a nature as to require holding that "state" action under the Fourteenth Amendment was involved in the denial of appellants' rights.

(Citations omitted.)

36. *Cf.* Van Alstyne, *Judicial Trend Toward Student Academic Freedom,* 20 U. FLA. L. REV. 290 *et seq.*; Wright, *supra,* note 8 at 1028; *Symposium,* 45 DENVER L.J. 497 (1968); Note, *Reasonable Rules, Reasonably Enforced—Guidelines for University Disciplinary Proceedings,* 53 MINN. L. REV. 301 *et seq.* (1968); Zanders v. Louisiana State Board of Education, 281 F.Supp. 747, 754-61 (D.C. La. 1968).

constitutional principles. Discussions of the applicability of constitutional protection of student rights in private institutions usually depend on one or both of two theories: (1) the state-action/private-action dichotomy; and (2) the "public function" concept as applied to private colleges and universities.

The most obvious test of "state action" is control by the state in one form or another—direct financial control, or administration of a school by state officials acting in their official capacity, or far-reaching regulation by the state.[37] Since none of these factors is usually applicable to private associations, courts have sometimes sought certain combinations of factors to provide a sufficient nexus to justify a finding of "state action."[38] Such factors might include space leased from the state; the public character of a building; special state franchise; particular requirements in a will as in the latest Girard case, *Pennsylvania v. Brown*;[39] participation in an overall state funding plan; and the like.[40] Or it might be that "state action" attaches to certain administrative units.[41] It is well known, for example, that the science departments of many prestigious institutions receive a major portion of their funding from the state or federal government, while the humanities or social sciences in the same schools tend to be privately funded.[42] Should, then, state action be applied by the courts to the whole, since each part benefits from the other subdivisions of the university? A ramification of the "state action" theory is the concept of education as a public function, whether under private or public auspices—a rationale applied to other private groups, such as "company towns"[43] and "party primaries."[44]

Even the most recent cases substantiate the reluctance of courts to extend the "state action" clause of the fourteenth amendment to private universities in the ways noted above. Most

37. Note, *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. at 1056-58.

38. *Id.* at 1058.

39. 270 F. Supp. 782 (E.D. Pa. 1967).

40. Note, *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1058-60. *Cf.* Hammond v. University of Tampa, 344 F.2d 951 (5th Cir. 1965).

41. Note, *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. at 1056-62.

42. *Id.* at 1061.

43. Marsh v. Alabama, 326 U.S. 501 (1946).

44. Terry v. Adams, 345 U.S. 461 (1953).

of them cite *Burton v. Wilmington Parking Authority*[45] in support of the concept that the fourteenth amendment is not concerned with "[i]ndividual invasion of individual rights."[46] In *Browns v. Mitchell*,[47] the only issue was whether the actions of the University of Denver in disciplining thirty-nine student participants in a prohibited sit-in constituted action under color of State law,[48] or—to put it more precisely—whether the State of Colorado had so major a part in the University's affairs that it could be termed a "joint participant" in the challenged disciplinary proceedings. The whole matter thus becomes a question of degree; the court brings forth its hypothetical measuring rod to ascertain the length and breadth of "state involvement." Its rather uncomplex reasoning runs thus: (1) the University receives no state funds; (2) its special tax exemption is not shown to be the means of dictating or influencing University affairs; (3) the claimed involvement is in no way associated with the challenged activity; (4) therefore, the requisite "state action" is absent.[49] No other valid conclusion could have been reached.

Grossner v. The Trustees of Columbia University[50] reached the same conclusion, with some variations in the reasoning. Plaintiffs' arguments seemed so weak that the court does not appear to have worked very hard at overturning them.[51] Simply stated, these arguments alleged that the state was involved in Columbia's affairs in: (1) a large percentage of income from public funds—federal and state; (2) lease of public land by New York City for construction of a new gymnasium; (3) the University's public function of educating persons.[52] On the issue

45. 365 U.S. 715 (1961).

46. *Id.* at 722.

47. 409 F.2d 593 (10th Cir. 1969).

48. *Id.* at 594.

49. *Id.* at 596.

50. 287 F. Supp. 535 (S.D.N.Y. 1968).

51. The opinion quotes rather extensively from plaintiffs' brief; illustrative of its quality is the following "argument" to prove that the "rule of law" must not be overrated:

> Had the Americans agreed that the rule of law, however despotic, must always prevail; had the Americans felt that dropping the tea in the harbor was going too far; had the Americans not focused on fundamental principles, this country might still be a colony today.

Id. at 545 (footnotes omitted). All this was supposed to prove that the action of the students in occupying five of Columbia University's buildings for approximately a week was action protected by the First Amendment.

52. *Id.* at 546-47.

of income from public funds, the court reasoned that receipt of money alone is insufficient to establish the recipient as a government agency, indicating quite rightly that, if it were sufficient, all kinds of contractors and enterprises that depend heavily on government business for large proportions of income would find themselves charged with "state action."[53] The "public function" issue is handled so summarily that it is really not dealt with at all. "Plaintiffs' remaining thought—that Columbia performs a 'public function' in 'educating persons' which may be 'likened to a company town or party primary system'—is, briefly, without any basis. It is not sounder for Columbia than it would be for Notre Dame or Yeshiva."[54] The remark patently begs the question (to say it is "no sounder for Columbia" than for others does not, of course, tell whether it is sound at all), though it is admitted that education is in the public interest. The court simply refrains from probing the issue of whether "public function" means "state action," dropping an indignant footnote which implies that the question was settled long since: "If the law were what plaintiffs declare it to be, the difficult problem of aid to 'private schools'—specifically, parochial schools—would not exist." Citing *Pierce v. Society of Sisters*,[55] the note adds: "Indeed, the very idea of a parochial school would be unthinkable."[56] Neither the plaintiffs nor the court in *Grossner* differentiated the concepts of "public service" approved by the state for performance by private institutions or associations, and genuine "public functions" performed by state officers or agencies.

However, there are scattered portents of possible changing interpretation. In a celebrated dictum in the case of *Guillory v. Administrators of Tulane University*,[57] Judge J. Skelly Wright, after presenting Tulane's argument that "the University, because of its private status, is immune from the command of the Fourteenth Amendment under the doctrine of the Civil Rights Cases,"[58] queries:

> At the outset, one may question whether any school or

53. *Id.* at 548.
54. *Id.* at 549.
55. 268 U.S. 510 (1925).
56. 287 F. Supp. 535, 549 n.19 (1968).
57. 203 F. Supp. 855 (E.D. La. 1962).
58. *Id.* at 858.

> college can ever be so "private" as to escape the reach of the Fourteenth Amendment. In a country dedicated to the creed that education is the only "sure foundation**of freedom," "without which no republic can maintain itself in strength," institutions of learning are not things of purely private concern. . . . Clearly, the administrators of private colleges are performing a public function. They do the work of the state, often in the place of the state. Does it not follow that they stand in the state's shoes? And, if so, are they not then agents of the state, subject to the constitutional restraints on governmental action, to the same extent as private persons who govern a company town, or control a political party, or run a city street car and bus service, or operate a train terminal.[59]

The court then finds indications that Tulane is a public institution: (1) because of its history as a state institution endowed by a private trust fund, and (2) because of its special indicia of present state involvement. On rehearing during trial on the merits later the same year, the court held that Tulane was a private university with insufficient state involvement to bring it under the fourteenth amendment.[60] The message is again clear: "state action" is not applicable to private universities. The legal relationship between them and their students must be sought elsewhere.

The same holding created an anomalous situation in *Powe v. Miles*,[61] because of its peculiar fact situation. Seven students joined in a prohibited demonstration on the campus of Alfred University, a private institution in New York. Four were students at the Liberal Arts College of Alfred University; three were students of the New York State College of Ceramics, a state-supported institution which Alfred University operates under contract with the State of New York. The New York State College of Ceramics is on Alfred University's campus. The seven students were thus from the same campus, joined in the same prohibited demonstration, violated the same regulations, ignored the same orders from their common Dean of Students, and were suspended at the same hearing. Nevertheless, the court distinguished the four Alfred University students from the three Ceramics College students. Answering, in the manner of *Browns* and *Grossner*, the usual "government aid" and "public function"

59. *Id.* at 858-59 (citations omitted).

60. Guillory v. Administrators of Tulane University, 212 F. Supp. 674, 687 (E.D. La. 1962).

61. 407 F.2d 73 (2d Cir. 1968).

arguments, along with several unique ones about the Ceramics College affiliation, the court held "state action" inapplicable for the four Alfred students, who were, consequently, not protected by the fourteenth amendment.[62] The other three students, on the contrary, were fully protected by fourteenth amendment guarantees against deprivation of due process by the same President and the same Dean of Students at the same hearing.[63] Though in the end it did not matter anyway, since plaintiffs' rights were not infringed, the case illustrates well the inadequacy of present legal posture in student rights cases.[64] Even if the results reached were fair to the students, there is something wrong with legal guidelines that lead to such a curious result. From the anomalous holding in *Powe v. Miles*, the conclusion is inescapable that the "state action" clause of the fourteenth amendment is too narrow a yardstick to measure the requisite degree of fair play essential in the legal relationship between students and universities, public or private.

A similar confusion exists in the currently most controversial aspect of student-university relationships, the area of residential privacy, but the confusion has different causes. Instead of the rather sharp dichotomy between applicability of constitutional principles in the public and the private sectors of education, one finds the legal guidelines blurred and undeveloped. Both public and private colleges and universities are grappling with the problem of the student as university resident. In the few cases which have thus far been litigated, the distinction between "public" and "private" fails, and constitutional theories have not been applied. An analysis of the reasons for the holdings in the several cases concerning residential privacy may exemplify the need to define more adequately the relationship between the student and his university in the eyes of the law. Two recent cases,

62. *Id.* at 82. Appzllants' argument is analogous to the point made in the text, at notes 40-44, concerning identification of the administrative unit to which "state action" attaches. It is entirely conceivable that a *Powe v. Miles* situation could arise at an institution where the major portion of the science budget was funded by the state or federal government, while humanities and social sciences were privately funded. Could, then, the university be considered as exercising "state action" relative to its science majors, but be "private" relative to English or history majors? The question itself highlights the anomaly.

63. *Id.*

64. Beaney, *How Private Are Private Institutions of Higher Education?*, in STUDENT PROTEST AND THE LAW 178 (G. HOLMES ed. 1969).

one in a California Appellate Court, the other in a Federal District Court in Alabama, exemplify the current approach of the judiciary to the question. The California case involved a private institution (The California Institute of Technology), the other a public one (Troy State University). In *People v. Kelly*,[65] police, escorted by a school official, conducted a warrantless search of a student's room to look for property reported stolen during several burglaries. The court accepted the search as justifiable on the grounds that police had probable cause for the student's arrest, and that dormitory rules allowed the person in charge to enter any room in an emergency.[66] "Emergency" was not defined, but the discretion of school officials to decide the presence of an emergency was assumed. Since the court was satisfied that school officials were acting reasonably, within their discretionary power, fourth amendment safeguards for the student were not significant. By accepting residence in the dormitory, the student impliedly promised to adhere to its rules, with an implied waiver of his constitutional rights. In the eyes of the *People v. Kelly* majority, the legal relationship between the student and his private university was a one-sided arrangement recognizing few student rights.

The most notable case on residential privacy is the recently litigated *Moore v. Student Affairs Committee of Troy State University*.[67] The court upheld the right of the University to authorize a search of a student's room, without his consent, by narcotics agents who found marijuana. Suspicion was aroused by information from a reliable source, and the Dean of Men had authorized the search. The student's right to be free of unreasonable search and seizure as required by the fourth amendment was acknowledged, but the validity of the University's written regulation reserving the right to enter for inspection purposes did not depend on a waiver of fourth amendment rights or a contractual theory, but on the reasonableness of the University's exercise of its supervisory duty, and on the certainty of probable cause. "It is settled law that the Fourth Amendment does not prohibit reasonable searches when the search is conducted by a superior charged with a responsibility of

65. 195 Cal. App. 2d 669, 16 Cal. Rptr. 177 (1961).
66. *Id.* at 676, 678, 16 Cal. Rptr. at 181, 184.
67. 284 F. Supp. 725 (M.D. Ala. 1968).

maintaining discipline and order or of maintaining security."[68] The "reasonableness" test, if applied without full consideration of students' constitutional right to privacy, tends to place the interest of the institution in a paramount position over that of students.[69] Both the *Moore* and the *Kelly* decisions emphasize the university's responsibility to maintain discipline and to promote an educational atmosphere by reasonable means. The constitutional issue, therefore, has not been squarely faced in a court decision. It would seem that students' fourth amendment rights with respect to institutions of higher learning stand in the same position that fourteenth amendment rights stood ten years ago, at the time of the *Steier* decision. Increased student concern with constitutional rights—at both private and public institutions—makes it predictable that the residential privacy issue will have its *Dixon*. Discussion will doubtless ensue about whether the actions of private college officials are invasions of privacy by private individuals, and thus unprotected by the fourth amendment, or whether they are in some fashion actions of government agents or officials, with fourth amendment responsibilities. Presumably courts will uphold the traditional view[70] of non-applicability of the fourth amendment to private party seizures, and, by implication, the non-applicability of the exclusionary rule. The issue could be complicated by developing trends on the admissibility of certain types of evidence under the fifth amendment.[71] Whatever the complications, the real question will have to be faced: what rights have the students, and to what extent may these rights be abridged by some preeminent role of the institution of higher learning?[72] The problem is being brought to a head by the fact that the student population explosion has forced off-campus living on

68. *Id.* at 730-31.

69. Bible, *The College Dormitory Student and the Fourth Amendment—A Sham or a Safeguard?*, 4 U.S.F. L. REV. 50, 61 (1969).

70. *See* Burdeau v. McDowell, 256 U.S. 465, 475 (1921):

> Fourth Amendment . . . protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies. . . .

71. Note, *Private Party Searches and Seizures—A Province of the Fifth Amendment*, 3 U.S.F. L. REV. 159, 164-69 (1968). However, since "search and seizure" tends to turn up real evidence rather than testimonial evidence in this era of student drug use, the fifth amendment question may not become pertinent.

72. Note, *College Searches and Seizures: Privacy and Due Process Problems on Campus*, 3 GEORGIA L. REV. 426, 429 (1969).

many students, with a resulting desire of numerous others to follow their colleagues to the greater freedom and security of off-campus living. Obviously, students who do not reside in dormitories retain their fourth amendment protections against unreasonable search and seizure; they are subject only to the ordinary landlord-tenant relationship.[73] Thus they know where they stand with regard to privacy and property rights, and they have recourse in the courts for any violation. Administrators and courts have not yet fully conceded the right of a student to privacy in his dormitory room. "Apparently, the rules of reasonableness and probable cause have so far proved too rigid for extension into this area."[74] When the change in the law comes—as it surely will—students at private institutions may find that courts will have to turn to non-constitutional theories in the residential privacy area, as they have in due process problems, in order to define the legal relationship between students and private universities.

APPLICABILITY OF NON-CONSTITUTIONAL THEORIES

A lengthy discussion entitled "The University and the Student," incorporated into the court's opinion in *Zanders v. Louisiana State Board of Education*,[75] highlights the two most common theories traditionally used to characterize the basic relations existing between the university and the student—the *in loco parentis* doctrine and the contract theory.[76] Also suggested as possible modes of defining the relationship are the fiduciary and the tort theories. Basically, what is happening is this: courts have refused to extend the "state action" concept to private colleges and universities, thus barring the student from successful showing that his legal relationship with his school is one in which the courts will see to it that the school does not infringe his constitutional rights. But courts are still faced with students and universities as adversaries in judicial proceedings. The rights and responsibilities of one must be weighed against the rights and

73. *Id.* at 435.

74. *Id.* at 440.

75. 281 F. Supp. 747 (W.D. La. 1968).

76. *Id.* at 755. It is a little puzzling that such a long and excellent treatise was included in the opinion; it seems to be extraneous dicta, since plaintiffs' prayer for declaratory and injunctive relief rested on grounds of alleged violations of their rights secured by the first and fourteenth amendments to the United States Constitution, and the court concluded that there was no evidence of the violation of these rights. *Id.* at 750.

responsibilities of the other, in terms acceptable before the law as imposing a duty on one or the other to act in a certain way. The difficulty is compounded by the fact, noted earlier, that the university's relationship to society itself is in transition, at the same time as the university's clientele becomes larger and more independent, with higher proportions of adult students. The result of all these factors has been to put a strain on the non-constitutional theories courts have used in litigating student-private college cases; taken individually, the theories are not quite complex enough to define a subtle and sensitive relationship. The following is a brief discussion of each theory and how it has been applied, then analysis of its validity in defining the student-university relationship, and in protecting student rights and university responsibilities.

Things were easy (for the school anyway) in the days of *in loco parentis*. Early cases, such as *Gott v. Berea College*,[77] cast the college or university authorities in the role of solicitous parents watching over the mental, moral, and physical well-being of their charges. But the demise of *in loco parentis* as a definition of the relationship is now complete[78]—and anyway the analogy always limped. Real parents may not legally sever all ties with their offspring, as educational institutions may do in extreme cases. The theory of *in loco parentis* has always been inadequate to define the school's relationship with its adult students—graduate and professional students, for example—and is still more unsatisfactory today when large numbers of undergraduates have reached their majority. Because of their size, state universities repudiated the doctrine sooner than smaller schools, especially sectarian ones—which often retain vestiges of this approach. The basic difficulty with *in loco parentis* as a statement of legal relationship was that it seemed to invite excessive and arbitrary regulation. The students either conformed, or departed—"shape up or ship out," as the college jargon has it. Thus, the doctrine was ineffective in protecting student rights. The university's duty to act for the good of its students (in the school's opinion of that good, not the student's) was the prime consideration.

A more benevolent form of *in loco parentis* describes the

77. 156 Ky. 376, 161 S.W. 204 (1913).

78. Goldberg v. Regents of the University of California, 248 Cal. App. 2d 867, 876, 57 Cal. Rptr. 463, 470 (1967).

student-university affiliation as a fiduciary one, to be "recognized as a consensual relationship with certain commonly understood, intrinsic characteristics which should be retained regardless of the language contained in the registration form, the bursar's receipt or the school bulletin."[79] The student, in other words, places his confidence in the good faith performance by educators of tasks for the student's benefit. The university is, so to speak, his educational mentor, whose integrity he trusts. Such a fiduciary characterization of the student-university relationship would be applicable to the relationships between students and public or private universities.[80] Its use would thus obviate the dual set of standards now applied in student-university cases.[81] Although no case has yet relied on this theory, presumably—were they to use it—courts would hold that the university must maintain a very high standard of unselfish concern for the sole good of the student-beneficiary. Institutions of higher learning would be required by law to demonstrate that their actions *re* students met the legal standards of the trustee of a charitable or private trust. However, the fiduciary theory is inadequate from the point of view of the student. "Because of the exceptionally high standard of conduct placed upon the fiduciary (for excellent reasons in a trust situation), there is necessarily very little responsibility, if any at all, placed upon the beneficiary of the fiduciary relationship."[82] Thus, the student, who should bear prime responsibility for himself and his own education, if "education" is to take place, is placed in a passive role. Another corollary of a legal fiduciary relationship between student and school would be the shifting of burden of proof to the trustee, that is, the institution, in any challenge to its position or decisions. Such a shift in burden of proof could have a healthy effect on the care and caution which a university brings to decisions relative to students, but it could have corresponding ill effects of requiring the university to respond to capricious and frivolous challenges, thus diverting it from its real goals.

Another legal theory suggested as a possible definition of the

79. Goldman, *The University and the Liberty of Its Students—A Fiduciary Theory*, 54 KENTUCKY L.J. 643, 667 (1966).

80. *Id.* at 673.

81. *Cf.* Powe v. Miles, 407 F.2d 73 (2d Cir. 1968), and text accompanying notes 57-60, *supra*.

82. Munch, *Comment*, 45 DENVER L.J. 533, 534 (1968).

student-university relationship is the tort approach, which "provides the means of rectifying an unjustified injury to this relationship."[83] Though a tort theory has been warmly supported as a possible solution to some student-university problems,[84] it would seem that it does not really define the nature of the relationship. Many types of injuries are actionable in tort, even among complete strangers. If a university could justify its actions in suspending or expelling a student in terms of weighing the relative interest of the university and the student, and could thus defend itself against liability in tort, its former or subsequent relationship with the student would still remain undefined. Or if the student won damages for deceit, or negligence, or for causing severe emotional distress, he would still not have his right to due process or right to privacy protected, unless he wanted to file another lawsuit.

The most frequently used of the non-constitutional theories of the student-university relationship in cases involving private institutions has been the contractual theory. Principles of contract law are applied as standards in judging conflicts between the student and his college or university. Typically, the reasoning goes something like this: attendance at a private institution is a "privilege" governed by certain conditions; these "conditions" are normally expressed or implied in the bulletin or other official publications such as dormitory regulations, and they serve as notice of the academic standards and non-academic conduct expected of the student. By his enrollment in the institution, the student impliedly (or expressly, in some cases) warrants that he knows and undertakes to abide by the rules of the institution; his failure to abide by them is a breach of his "contract," punishable in serious situations by suspension or expulsion. Judicial acceptance of reasoning such as the foregoing is evidenced by court reliance on these arguments in cases involving private institutions. In *Dehaan v. Brandeis University*,[85] the court upheld the University's action denying to plaintiff the privilege of registering again at Brandeis, and cited in support of its action a provision of the University's catalog, reserving the right to sever

83. Note, *Judicial Intervention in Expulsions or Suspensions by Private Universities*, 5 WILLAMETTE L.J. 277, 291 (1969).

84. *Id.*

85. 150 F. Supp. 626 (D.C. Mass. 1957).

a student's connection with the University for any reason deemed appropriate by the institution. The Supreme Court of New York, Appellate Division, in *Carr v. St. John's University*,[86] drawing its precedents from prior New York cases, explicitly relies upon an implied contract, with conditions on both sides.[87] Continuing to use the terminology of contract law, the court speaks of implied terms or conditions on the student's side as obvious and necessary to the total contract. "[T]here is implied in such contract a term or condition that the student will not be guilty of such misconduct as would be subversive of the discipline of the college or school, or as would show him to be morally unfit to be continued as a member thereof."[88] Quoting from the regulations on discipline, the court shows that the University was acting within its jurisdiction and its honest, factually-based discretion, and holds that "a court may not review the exercise of its discretion"[89] in such circumstances. In other words, both parties to the implied contract are held to its terms and conditions.

On the debit side of the contractual theory of the student-university relationship are several significant points, which have analogies in commercial contracts. First, the bargaining position in a student-university "contract" is very unequal.[90] The student does not, of course, have to attend any specified institution. He may select any of several different kinds of colleges, the regulations of which are known to him in advance. But should he wish to go to a particular school, he often has no choice but to accept the stated terms and no initial power to bargain about any of the conditions.[91] It is a simple "contract of adhesion."

86. 17 A.D. 2d 632, 231 N.Y.S. 2d 410 (Sup. Ct. A.D. 1962).

87. *Id.* at 635, 231 N.Y.S. 2d at 413.

88. *Id.*

89. *Id.* at 636, 231 N.Y.S. at 414.

90. This point should not be overstressed, either in questions of residential regulations or in other rules setting guidelines for student conduct. Those working directly with students in higher education today know that students have a strong, sometimes decisive voice in making regulations which conern them. The "unequal bargaining power" is sometimes between the individual student and a student organization rather than between the individual student and the administration.

91. *Cf.* Greene v. Howard University, 271 F. Supp. 609 (1967), *dismissed as moot*, 412 F.2d 1128 (D.C. Cir. 1969), where the court held that where the university's catalog stated that the university reserved the right, and student—by his attendance—conceded this right, to require withdrawal at any time for any reason deemed sufficient to the university, the students were without constitutional, statutory, or contractual rights to notice of charges and hearing before expulsion. The case was appealed, and the students won a

Secondly, it seems unreasonable to charge students with acceptance of regulations of which they may be unaware, and of which they had no more notice than the fact that they were mailed a copy of the university bulletin when they applied for admission.[92] Cogent arguments have been advanced to demonstrate the validity of the contractual definition of the student-university relationship.[93] It is reasoned that private college administrators should create a system of private contractual law to regulate university life; if they do not, courts will probably find or create contractual theories in order to avoid harsh results.[94] Certainly such a system of private contractual law would clarify in many ways some of the legal aspects of the student-university affiliation. But the contract will always be something of a "contract of adhesion." The undergraduate student remains a junior colleague in the educational venture, with the university a disproportionately strong partner.[95] In such an arrangement, the degree of "fair play" is very dependent on the extent to which university officials have an enlightened view of their role.

CONCLUSION

The above analysis demonstrates that the legal relationship between private institutions of higher learning and their students is diffuse and unclear. Constitutional theories neither define the relationship nor protect the rights of students, because courts have painstakingly shown them not applicable. Doubtless the courts are correct. Why should it be necessary to mutilate constitutional language in order to reach a result which is fair both to the student and to his school? Non-constitutional theories, as the courts have applied them, have operated mostly in favor of administrators, upholding their reasonable authority for lack of judicial power to do otherwise. No national legal standard has arisen, because student conduct cases litigated with respect to both private and public institutions have so far been adjudicated below the Supreme Court level, with divergences among the Federal

temporary restraining order in 1967. Last year (1969) the case was dismissed as moot, since the students had graduated.

92. Note, *Judicial Intervention in Expulsions or Suspensions by Private Universities,* 5 WILLAMETTE L.J. 277, 282 (1969).

93. Wilkinson and Rolapp, *The Private College and Student Discipline,* 56 A.B.A.J. 121, 125 (1970).

94. *Id.* at 126.

95. Magrath, *Comment,* 45 DENVER L.J. 614, 616 (1968).

District Courts and Courts of Appeal.[96] The unknown factor is when the Supreme Court will see fit to grant certiorari and rule on the validity of the various theories with respect to private universities and colleges. The constitutional and non-constitutional theories alike, the areas they attempt to protect, shed light on what the issues are in the student-school legal relationship. The constitutional theories protect the right to procedural due process. It is predictable that they will soon protect the right to privacy. Neither of these rights is really protected by the non-constitutional theories, because when the courts use them, they lean heavily on reasonable administrative discretion.

How, then, can a rational theory of the relationship be established for private institutions—one which courts will support and uphold? Ideally, there should not have to be a "legal" relationship. Higher education by its very nature should be in the vanguard of the enlightened, the just, the true. Students are citizens. They should be treated as individuals worthy of respect—and they should so treat others. Because they are human beings—rather than because the institution they attend is publicly or privately funded—they should have fair procedures in disciplinary matters, and they should respect these procedures. Because they are persons, they should have the rights to privacy, commensurate with the rights of others, in their place of residence. Administrators, faculties, and students should participate in setting up rules and codes of conduct. The university itself should take the initiative.

Nothing that has been said implies that all institutions will become carbon copies. Private institutions have the right to be what they were founded for, to set their own goals and purposes, and to define—with student participation—the reasonable means to effectuate these goals. They violate their own purpose if for "self-protection" they take refuge in ambiguous or overly general rules.[97] They may enforce well-advertised codes of conduct, and

96. *Cf.* note 97, *infra.*

97. The entire area of the constitutionality of over-vague, over-general, or ambiguous campus rules has become progressively more prominent in the burgeoning law of student rights. At present, the question is less pressing in private universities, because of the above-discussed reluctance of the courts to apply constitutional theories to private educational institutions. However, in view of recent discussions such as Wright, *supra*, note 8 at 1060-67, and the holding in Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969), affirming a

discipline students who violate them, safeguarding due process. Presumably, the best of them will limit rules to matters which adversely affect the university community's pursuit of its educational purposes.[98] Once such goals and purposes are set, courts could look at the established means to achieve them, test the reasonableness of these means in the light of the institution's announced goals, and adjudicate accordingly—affording substantive as well as procedural due process to the students. The right of the institution to be the kind of university or college it wishes to be, as well as the right of the student to "fair play," would thus be safeguarded and preserved.

But this is not Utopia. Perhaps these suggestions put too much burden of perfection on both students and schools. The courts will doubtless be needed to settle conflicts. Whatever theories they may use, court "solutions" will be less than adequate for the definition of a relationship more complex than any of the theories. However, there seems to be no present alternative.

SALLY M. FURAY

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holding of unconstitutional vagueness of the University of Wisconsin's "misconduct" rule, it behooves all educational institutions, public or private, to express their standard of conduct in "reasonably clear and narrow rules." *Id.* at 167. While assuming that the power of the university to protect itself against disruption is undisputed, the *Soglin* court notes that "Power to punish and the rules defining the exercise of that power are not, however, identical," and concludes that the term "misconduct" as a standard "must fall for vagueness. . . . It contains no clues which could assist a student, an administrator or a reviewing judge in determining whether conduct not transgressing statutes is susceptible to punishment by the University as 'misconduct'." *Id.* at 167-68. Like the *Soglin* court, Professor Wright, in the article just cited, disagrees with the judges in Esteban v. Central Missouri State College, 290 F. Supp. 622 (W.D. Mo. 1968) which avers that legal doctrines of unconstitutional broadness do not apply to standards of student conduct. Wright, in fact, goes even further than the *Soglin* court in expressing his conviction that courts should (and, "in the long run the courts will") accept "the same requirements of specificity that are applied to criminal statutes." Wright, *supra* note 8 at 1065.

98. McKay, *The Student as Private Citizen*, 45 DENVER L.J. 558, 560-61 (1968).